Brief of Austin Walrath for C

Filed April 21, 1898.

SUPREME COURT OF THE UNITED STATES

AUSTIN WALRATH,

Appellant,

vs.

CHAMPION GOLD MINING CO.,

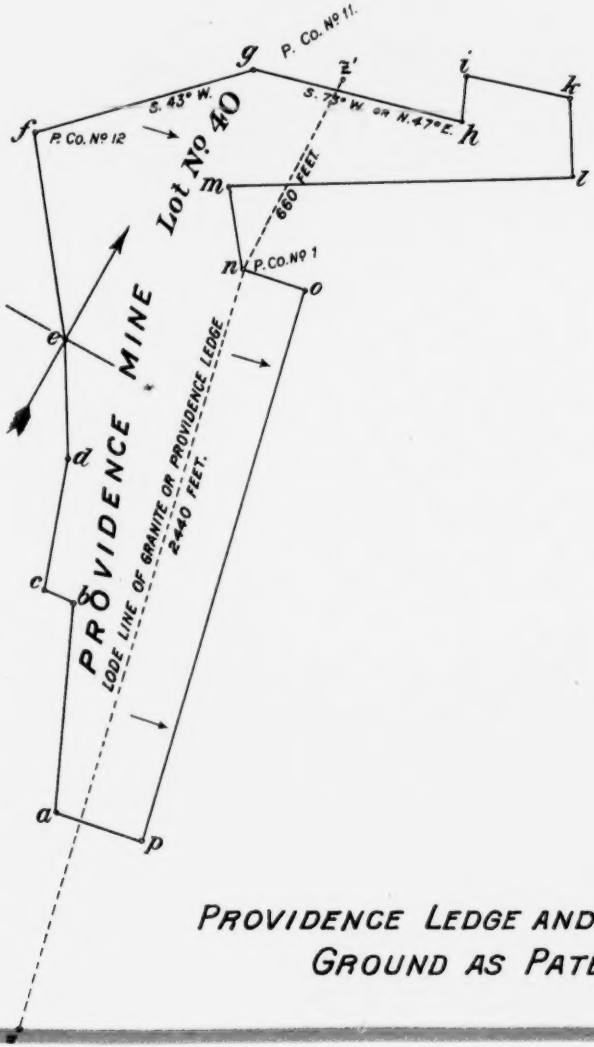
Appellee.

BRIEF FOR APPELLANT.

JAMES F. SMITH,
DANIEL TITUS,
R. R. BIGELOW,

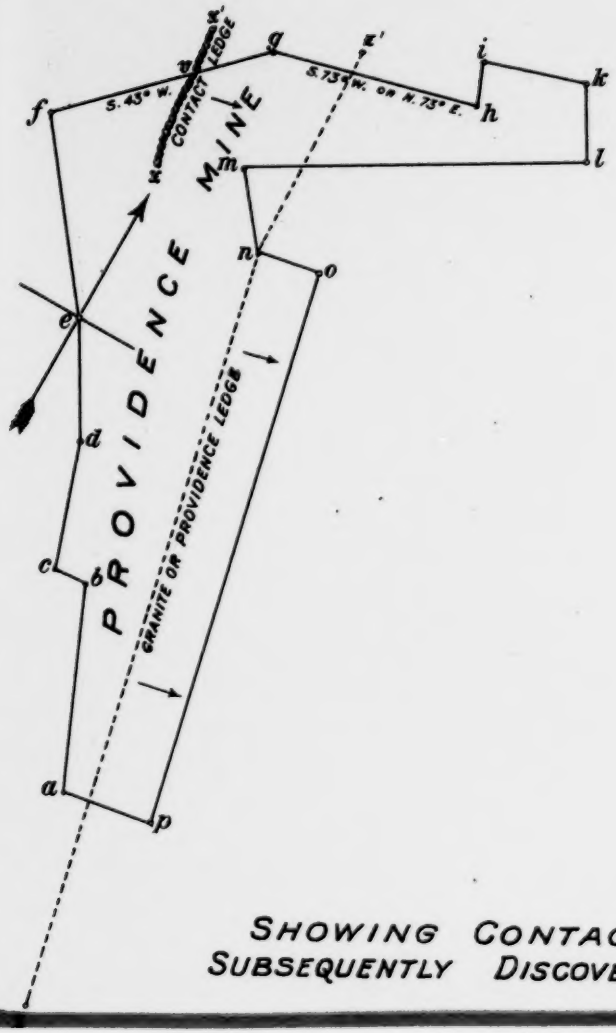
Solicitors for Austin Walrath.

FIG. 1.



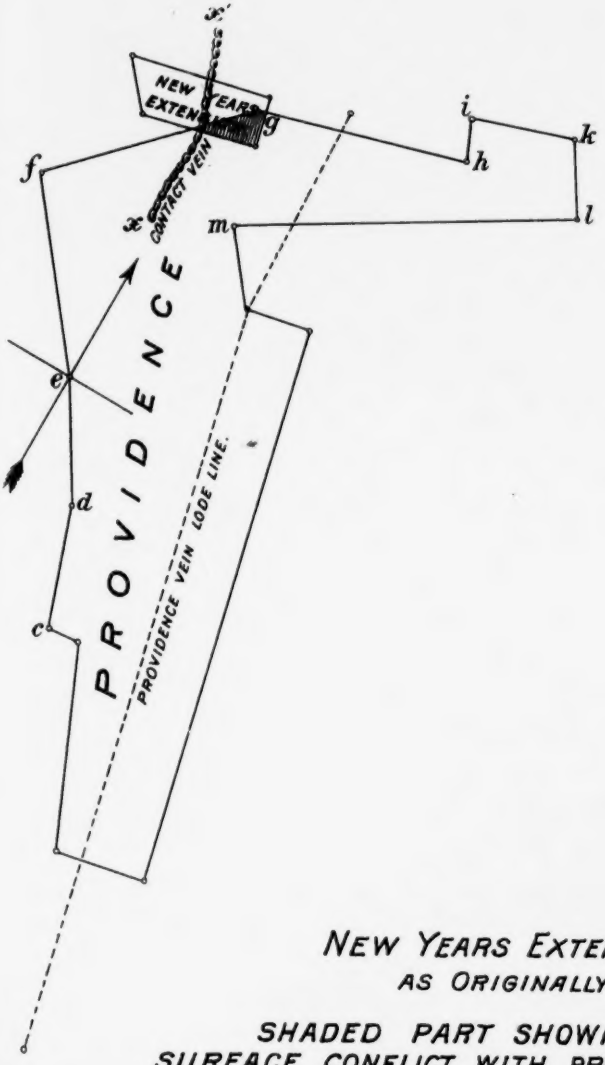
PROVIDENCE LEDGE AND SURFACE GROUND AS PATENTED

FIG. 2.



SHOWING CONTACT LEDGE SUBSEQUENTLY DISCOVERED.

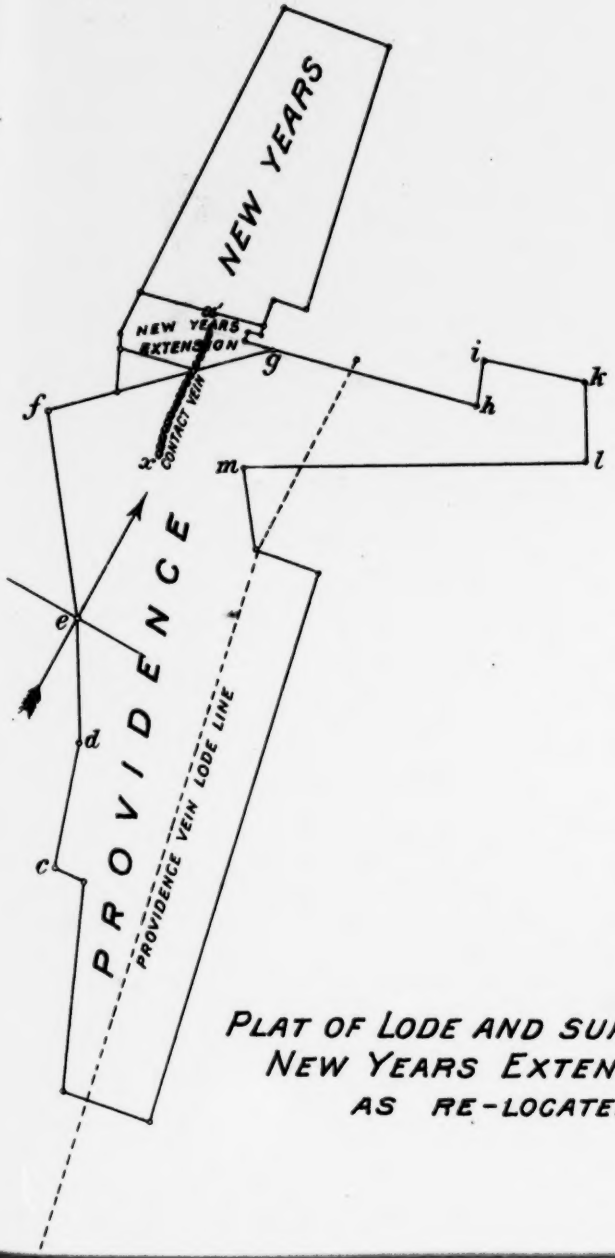
FIG. 3.



NEW YEARS EXTENSION
AS ORIGINALLY LOCATED.

SHADED PART SHOWING LODE AND SURFACE CONFLICT WITH PROVIDENCE.

FIG. 4.



PLAT OF LODE AND SURFACE OF NEW YEARS EXTENSION AS RE-LOCATED.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

AUSTIN WALRATH,

Appellant,

vs.

CHAMPION GOLD MINING COMPANY,

Appellee.

STATEMENT OF THE CASE.

This action, brought in the Superior Court of Nevada County, California, involves title to a triangular shaped section of what is known as the "Contact," "Ural," or "Back" ledge of gold-bearing ore, situated in the same county, claimed by complainant to be a portion of the Providence Mine, to which complainant has title through a patent from the United States, and by defendant, a corporation, to be a part of the New Years Extension Mine owned by it.

The relative situation of the two properties and the portion of the ledge in controversy is shown upon figure 6, in front of this Brief; the disputed section being contained between the lines thereon marked "Line claimed by Providence" and "Line claimed by Champion."

The figures marked "New Years" and "New Years Extension" represent the surface of the mining properties

owned by defendant, while that marked "Providence Mine" represents the surface of the patented ground of the plaintiff.

The action was brought May 24th, 1892, to recover $300,000.00 damages for ore extracted from the ledge and carried away by the defendant, and for an injunction against further trespasses thereon.

Upon motion of appellee the action was removed to the United States Circuit Court, as involving a federal question, where the complainant recast his pleadings so as to separate the action into a bill in equity, upon which the action is now proceeding, and an action at law for the damages alleged.

The suit in equity was tried in the Circuit Court and decided mainly in favor of the appellee.

From this decree the complainant appealed to the Court of Appeals for the Ninth Circuit, where it was modified, and, as modified, affirmed.

The appellant now brings the case to this court upon writ of error from the Court of Appeals.

The complainant's title is deraigned as follows: In 1857, under the miner's rules and customs then in force, thirty-one locators located thirty-one hundred feet of the Providence or Granite Lode. By mesne conveyances the title to this location became vested in the Providence Gold and Silver Mining Company, and on April 28th, 1871, that company obtained a patent to thirty-one hundred feet of the lode, and for surface ground as described in the patent. (See Transcript, pages 250-5, where the patent is set out at length, and figure 1, which is a reproduction of the essential features of the plat accompanying the patent.)

The title thus granted to the Providence Gold and Silver Mining Company was, before the commencement of this suit, vested in the complainant.

The ledge, as granted by the patent, extends thirty feet north of the north surface line of the location, and some six hundred and eighty feet south of the south surface line.

The patent conveyed only the Providence ledge and the surface ground. All other ledges contained within the surface lines were expressly reserved.

But by the act of Congress of May 10th, 1872, exclusive possession of all the surface included within the lines of the location was granted to the owners of the Providence, together with all other lodes or ledges having their tops or apexes within such surface lines. This grant, of course, included the Contact vein, subsequently discovered within said boundaries, and now constituting the bone of contention in this action.

The Contact vein is shown upon figure 2, and crosses the surface line f-g of the Providence location.

On September 29th, 1877, the appellee and defendant, the Champion Mining Company, made a location upon the Contact vein called the New Years Extension Mine This location overlapped, both as to surface ground and lode, upon the Providence location; that is, the lode line and surface lines of the said New Years Extension extended to the south of the boundary line f-g of the Providence location.

The New Years Extension Mine is shown on figure 3, together with the conflict caused by the overlap; the con-

flicting surface portions being shaded, and showing the Contact vein passing through it.

In the year 1884 the complainant and his co-owners objected to the overlap, and demanded of the Champion Mining Company that it abandon all claims to the surface and lode to the south of the Providence boundary line, above described. Thereupon, in the month of November, 1884, John Vincent, the superintendent of the defendant, the Champion Mining Company, under the authority and by the direction of the said company, relocated the New Years Extension Mine by a notice of relocation, in which the fact of the overlap under the original location was particularly recited, and the lines were readjusted so as to avoid the overlap and to conform to said line f-g of the Providence Mine. (See figure 4, which shows the boundaries of the New Years Extension as relocated.)

In the notice of relocation the lode line was particularly described as follows: "The lode line of this claim as originally located, and which I hereby relocate, is described as follows: Commencing at a point on the northerly bank of Deer creek, which point is 60 feet S., 11 degrees 45 minutes east of the mouth of the New Years tunnel, and running thence along the line of the lode towards the N. E. corner of the Providence mill, about S. 46 degrees 15 minutes east, 200 feet, more or less, to a point and stake on the northerly line of the Providence Mine, patented, designated as Mineral Lot No. 40 for the south end of said lode line."

It also contained the following statement:

"And whereas, part of this claim, as originally described and as hereby relocated, conflicts with the rights granted by the letters patent of said Providence Mine, said Lot No. 40, now, therefore, so much of this claim, both for lode and surface ground, as originally conflicted or now conflicts with any portion of the surface or lode claims or rights granted by said patent, is and are hereby abandoned, which portion of this claim so abandoned is described as follows: All that portion of the above described New Years Extension Claim for surface and lode which lies south of the northern boundary line of said Providence Mine, which runs north 43 degrees 10 minutes east, across the southeastern corner of this claim."

The New Years Extension, as relocated, is coterminous with the Providence Mine on the northerly boundary line, designated as the line f-g, running south 43 degrees west.

That line is the only boundary between the two properties, and the only boundary of the Providence location which is crossed by the Contact ledge. After the relocation, all the mining operations of the Champion Mining Company on the Contact ledge, until the trespasses now complained of, were made to conform to the lines of the New Years relocation, and so as not to conflict with the Providence. (See Transcript, pages 154-5.)

The defendant thereafter laid out and sunk an inclined shaft parallel with the line f-g of the Providence, and that line extended in its own direction, so as not to cross or conflict with that line.

From this shaft, levels were run every hundred feet upon the Contact vein, but none of them ever crossed that line until about three months before this suit was begun, when the 1,000 foot level was driven across it into the ground in dispute. Subsequently, the eighth and ninth levels were driven across.

The work done by the Providence was carried on through a shaft sunk on the Providence or Granite ledge, from which shaft a crosscut was run back to the Contact vein on the 600 foot level, and another on the 1,250 foot level, and much of the ground now in controversy was thereby prospected and opened up by complainant and his co-owners. (See fig. 5.)

The main workings of both companies are shown on figure 5. The small lines running from the Champion shaft represent the levels run by the defendant, along the strike of the Contact vein.

The claims of the respective parties will be readily understood by reference to figure 6, which shows the relative position of all the mining properties belonging to both, with the lines claimed by them.

The portion of the Contact vein in dispute is that upon the dip of the ledge lying between the line marked "Line claimed by Providence" and the line marked "Line claimed by Champion."

The apex of the Contact vein is represented by the dotted line x-x^1, and shows the vein as far as exposed in both the Champion and Providence ground. South of x, the course of the vein in the Providence ground is unknown.

The line f-g is the same line as that designated A-B by some of the witnesses.

Upon the trial the Circuit Court held that there could be but one end line for each end of the Providence location, and that the lines g-h and a-p constituted such end lines; that such lines constituted the end lines of not only the originally discovered Providence lode, but also of every other vein that might be discovered within the surface lines of the location. But, notwithstanding this holding, in entering the decree the line f-g was also established as an end line of the Contact vein, but for its length only, and then that from "g" the line g-h, and that line extended indefinitely eastwardly, constituted another end line for the same end of the lode, and constituted the line through which the plane determinative of all extralateral rights in the vein must be drawn.

From this decree the appellant here was allowed an appeal to the Circuit Court of Appeals.

The latter court established the line g-h-h^1 as the sole end line of the Contact vein, and reversed the decree of the Circuit Court in so far as it fixed the line f-g as an end line.

As a result of this decree the complainant was not only shut out of all extralateral rights in the Contact vein north of the line g-h-h^1, but also of that portion of the vein lying vertically beneath the surface lines of the Providence which extend north of that line, and which are marked upon the figures as constituting the parallelogram h-i-k-h^1, which was awarded to the Champion. (See figure 6, showing the end line fixed by the Circuit Court, and that line as subsequently fixed by the Court of Appeals, with the latter line extended in its own direction both eastwardly and westerly.)

From the judgment of the Circuit Court of Appeals the appellant has appealed to this Court, and assigns the following errors:

Assignment of Errors.

I.

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding that the surface line of the Providence Mining Claim, described in appellant's bill of complaint as running S. 43 degrees W., was not the northerly end line of the ledge designated in said bill of complaint and in appellee's answer thereto as the "Back or Ural or Contact" Ledge.

II.

The United States Circuit Court of Appeals in and for the Ninth Circuit erred in holding that the appellant is the owner only of so much of the "Ural or Contact" ledge within the surface ground of the Providence Mining Claim as lies S. of plane drawn vertically downward through that surface line of said Providence mining ground continued indefinitely in its own direction, which is designated in said decree by the letters g-h, and described in said bill of complaint as running from the top of a large boulder on the S. bank of Deer creek, S. 73 degrees W. along the S. side of Deer creek, 9 chains and 80 links to the top of a boulder 8 feet in diameter in the bed of the said creek.

III.

The United States Circuit Court of Appeals in and for the Ninth Circuit erred in holding that the appellee was the owner of all such portions of the "Ural or Contact" ledge as lie N. of the plane drawn through the line continued indefinitely in its own direction, which is designated in said decree by the letters g-h, and described in said bill of complaint as running S. 73 degrees W. along the S. side of Deer creek, from the top of a large boulder on the south bank of said creek, 9 chains and 80 links to the top of a boulder 8 feet in diameter in the bed of said creek.

IV.

The said United States Circuit Court of Appeals erred in deciding and holding that appellant and his co-owners were only entitled to such portions of the "Back or Contact" ledge as lie between vertical planes drawn downward through the lines described in its decision and decree as g-h and a-p, continued indefinitely in their own direction.

V.

The United States Circuit Court of Appeals in and for the Ninth Circuit erred in not holding that the complainant and his co-owners were the owners and entitled to all such parts of said "Contact or Ural" ledge as lie southeasterly of the line described in said bill of complaint as running S. 43 degrees W. and S. E. of a bounding plane drawn through said line prolonged indefinitely in its own direction.

VI.

The United States Circuit Court of Appeals in and for the Ninth Circuit erred in fixing and determining any of appellant's right to said "Ural or Contact" ledge by a bounding plane drawn through the said line described as running S. 73 degrees W.

VII.

The United States Circuit Court of Appeals in and for the Ninth Circuit erred in not fixing said line running S. 43 degrees W. as the only end line by which the right of the appellant should be determined in his pursuit of said "contact or Ural" ledge beyond his surface ground.

VIII.

The United States Circuit Court of Appeals in and for the Ninth Circuit erred in not enjoining appellee from pursuing said "Contact or Ural" ledge S. E. of said line running S. 43 degrees W. and S. E. of a bounding plane drawn through said line prolonged indefinitely in its own direction.

IX.

The United States Circuit Court of Appeals in and for the Ninth Circuit erred in allowing and permitting appellee to enter within the surface lines of the Providence mining ground, cut down vertically to the center of the earth, and to take therefrom any part or portion of the said "Back of Contact" ledge, or any ledge.

X.

The United States Circuit Court of Appeals in and for the Ninth Circuit erred in not holding that the appellant and his co-owners were entitled to the absolute use and enjoyment of every ledge within the surface lines of said Providence Mining Claim cut down vertically to the center of the earth.

Argument.

There are some arguments which apply especially to the ninth and tenth assignments of error, and we consequently consider them first.

They refer to that portion of the Contact vein within the Providence boundaries which lies north of the north end line fixed by the Court, and which is described upon Figure 6 as the parallelogram bounded by the lines marked h-i-k-h^1.

The owner of a mining location is the owner of every part of every ledge situated within the surface lines of his location extended downward vertically, the top or apex of which ledge is also within his boundaries.

We base this contention upon the following provisions of the act of May 10th, 1872.

"The locators of all mining locations heretofore made, "or which shall hereafter be made, on any mineral vein, "lode, or ledge situated on the public domain, their heirs "and assigns, where no adverse claim exists on the tenth "day of May, eighteen hundred and seventy-two, so long "as they comply with the laws of the United States, and "with State, territorial, and local regulations not in con-

"flict with the laws of the United States governing their "possessory title, shall have the exclusive right of pos- "session and enjoyment of all the surface included within "the lines of their locations, and of all veins, lodes, and "ledges throughout their entire depth, the top or apex of "which lies inside of such surface lines extended down- "ward vertically, although such veins, lodes, or ledges "may so far depart from a perpendicular in their course "downward as to extend outside the vertical side lines of "such surface locations. But their right of possession "to such outside parts of such veins or ledges shall be con- "fined to such portions thereof as lie between vertical "planes drawn downward, as above described, through "the end lines of their locations, so continued in their own "direction that such planes will intersect such exterior "parts of such veins or ledges. And nothing in this sec- "tion shall authorize the locator or possessor of a vein or "lode which extends in its downward course beyond the "vertical lines of his claim to enter upon the surface of a "claim owned or possessed by another."

Act of May 10, 1872, sec. 2.
Sec. 2322, U. S. Rev. Statutes.

That section gave the locators of mining claims, theretofore located, "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

We stop the quotation here. As will be readily seen, all the rest of the section applies to the rights granted

the locator in veins or ledges outside the lines of his location; that is, his rights in ledges after they have passed upon their dip from beneath the surface lines of the location.

But the language quoted gives him absolutely all veins, lodes, and ledges, without regard to end lines or end-line planes, which are found within the surface lines of his location extended downward vertically, the tops or apexes of which also lie within such boundaries so extended.

The top or apex of a ledge is the end or edge of the ledge which approaches nearest to the surface, and it is often a line of great length.

Larkin v. Upton, 144 U. S. 19.

Any mining location which contains this end or edge, has within it the top or apex of a vein.

It is undisputed that the Providence location does contain within its boundaries several hundred feet of the top or apex of the Contact vein.

It is undisputed that a portion of that Contact vein lies beneath that part of the Providence location contained within the lines h-i-k-h^1 extended downward vertically.

This portion lies north of the boundary line g-h and its prolongation h^1-h^{11}, fixed by the Court as the northern boundary of the Providence location, and consequently, by the decree, the plaintiff is deprived of a portion of a vein within his boundaries, the top or apex of which is also within his boundaries.

We submit that it is scarcely possible to show error more clearly.

The only answer heretofore attempted to be made to this is, that while the Providence location does have a portion of the apex of the Contact vein, it does not have that portion of the apex which overlies the vein where it passes beneath h-i-k-h¹.

We answer that it is unnecessary for it to have such overlying apex. The statute does not use the word "overlying." The grant is absolute. It is of all of every vein lying within the boundaries of the location, of which the top or apex also lies within the surface lines extended downward vertically.

The Courts do not have the power to amend the act so as to include the condition that it must also be the "overlying" apex.

In no case coming under our observation other than the present has it ever been held or suggested that even as to outside parts of the vein—that is, parts of the vein which, upon its dip, have departed entirely from the side lines of the location—the "overlying" apex cuts any figure.

Whether, upon the dip, the plane of the location shall descend into the earth at right angles with the strike of the vein, so that the apex would overlie that portion of it owned by the location, or to the right or left, so that it would not so overlie, depends upon the angle of the end lines of the location, the distance from the surface, and the dip of the vein.

Figure 7, opposite this page, will illustrate this point. In this figure, if the ore were found upon the dip of the ledge, as is assumed, "A" being the senior location, the ore would belong to it, although the overlying apex is in "B." This principle is illustrated by the Argentine-Ter-

FIG. 7.

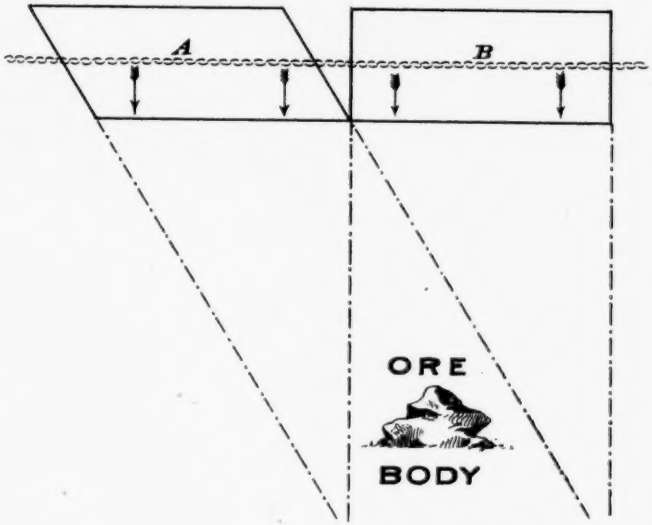
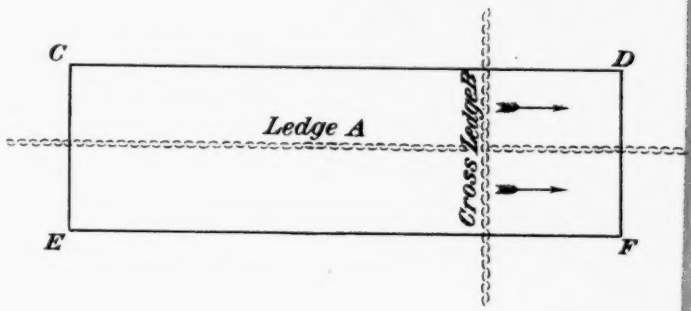


FIG. 8.



rible Case, 122 U. S. 478, and is clearly stated and illustrated in Lindley on Mines, section 365. See, also, section 487 of the same author, where a diagram is given of the locations involved in the Argentine-Terrible case.

If this is the case as to parts of the vein lying perhaps hundreds of feet to the side of the location, it certainly should be equally true as to parts within its boundaries.

Had the north boundary line of the Providence location run straight from the point marked "f" to the point marked "i" on the figures, there can be no question but that line would have constituted the end line of the Contact vein, and consequently that the ore found within the parallelogram now being considered, belonged to the Providence. The only difference between that case and the situation here is, that the line here runs irregularly to the same point. But that, in a location made under the law of 1866, as will be hereafter abundantly shown, cannot possibly make any difference, because under that act end lines did not have to be straight, nor parallel with one another. The result is that the ore must belong to the Providence, just as much as it would if the line were straight.

The Circuit Court of Appeals erred in fixing the line g-h-h^1 as the northern end line of the Providence location, and in bounding the complainant's rights in the contact vein by the plane of that line, instead of by the plane of the line f-g.

Assignments of error 1-8 refer in different forms to the alleged error of the Court in fixing the line g-h-h^1 of the Providence as the end line of the Contact vein, instead of the line f-g-g^1, and they may be conveniently considered together.

The patent of the Providence ledge was conclusive evidence of complainant's title to thirty-one hundred feet in length of that vein. This carried the northern end of the ledge thirty feet beyond the line fixed by the Court.

The language of the grant with respect to the ledge is:

"It being the intent and meaning of these presents to "convey unto the Providence Gold and Silver Mining "Company, and to their successors and assigns, the said "vein or lode in its entire width for the distance of thirty-"one hundred (3100) feet along the course thereof."

The width of the ledge is the distance between the walls.

We have here the length and width of the Providence ledge, as granted by the patent.

The validity of this grant of the ledge beyond the north boundary line is only incidentally involved here, but in that respect it is important as tending to throw light upon the question of whether that line should be treated as the northern end line of the Contact ledge. If it is not

the end line of the Providence location, then certainly there is no reason for holding it to be the end line of the Contact vein.

Under the provisions of the act of 1866, under which the Providence patent was obtained, it was unnecessary that surface ground should be taken in order to obtain the ledge. Prior to 1872 locations were made upon the ledges without regard to surface ground. If any surface ground was permitted by the local rules and regulations to be taken in connection with the vein, it was as a mere incident thereto, and for the convenient working of the same.

Lindley on Mines, secs. 58, 567.

The act of 1866 was but the crystallization of the miners' rules and customs.

Jennison v. Kirk, 98 U. S. 453.

Broder v. Natoma Water Co., 101 Id. 275.

There is no provision in the act of 1866, as there is in that of May 10th, 1872, requiring surface ground to be staked or located or taken in the location of a ledge, or in connection with a patent to a mining claim.

Surface ground being taken simply for the convenient working of the ledge, it could all be taken on either or both sides of the ledge or at the end, or there might be no surface at all taken, except as it would be included within the walls of the ledge.

Lindley on Mines, sec. 59.

As shown by that author, it was the practice of the land department under that act to issue patents for veins alone, without surface ground on either side.

There is nothing in the act indicating that a patent to a lode, intentionally issued as this one was for thirty feet of the Providence lode north of the surface line therein described, is not entirely valid, nor, so far as we have been able to find, has it ever been decided that it was not.

The Flagstaff Case, 98 U. S. 463, King v. Amy & Silversmith Min. Co., 152 U. S. 222, and cases announcing the same principle as those cases, are not in point here.

In those cases locations had been made along what was supposed to be the line of the lode, and patents issued in the same manner. The patent showed no purpose or intention to grant a ledge separate from the patented surface.

Subsequently it was found that the ledge left the side line of the patented ground, and the question was whether the owner could follow it wherever it might run, regardless of the patented lines, and regardless of the rights of others who had made locations outside those lines, and it was held he could not. No intention was there shown to grant a ledge outside the surface boundaries.

But in the case at bar, the purpose, clearly stated and restated, was to grant over seven hundred feet of the ledge lying entirely outside the surface lines. This fact was also clearly marked upon the plat accompanying the patent, of which, as to that, Fig. 1 herein is a reproduction.

See Patent in Transcript, page 250.

There was here no mistake as to the course of the vein, and no intention to cover it by the surface lines of the patent. In the Flagstaff and similar cases, a patent having been granted for a vein and surface ground running in one direction, the question was whether a vein located by others running in a different direction, and outside the patented ground, could be held under that patent. Here the question is whether, under the act of 1866, a patent for part of a vein, correctly describing it, is valid without surface ground being included on each side. We contend that it is.

If it is, then the line ~~f-g~~ g-k is not the end of the location, but the location extends 30 feet farther north.

Before patent, the United States owns the mineral land the same as any other proprietor. It could grant ledges separate from the surface ground if it saw fit so to do.

Mr. Lindley says: "The government, being the owner "of the fee, may carve from it the ownership of the vein. "It may grant the surface to one and the vein to another."

Lindley on Mines, sec. 568; see also sec. 600.

The law authorized a grant in the form in which it was made in this case. Why should it not convey to the patentee all of the vein that it purports to convey?

We believe it did, and consequently that the line g-h-h^1 fixed by the Court is not, nor was it intended to be, an end line of the location, but simply one of the exterior lines of the surface ground.

In fact, under the act of 1866, that is all that any boundary line amounted to, as it had no necessary connection with the vein itself.

The patent to the Providence Mining Claim having been granted April 28th, 1871, the rights of the complainant as to that lode must be measured by the provisions of the act of 1866, then in force.

If his title to thirty-one hundred feet of the lode was valid then, it is valid still. By the patent it became a vested right, that could not be subsequently impaired or destroyed, even if attempted, which it was not.

Lindley on Mines, sec. 539.

FORM OF LOCATION UNDER THE ACT OF 1866.

Under the act of 1866, the patenting of the Providence Mine in its irregular shape was in all respects legal and proper.

That act did not require the location to be made in the form of a parallelogram or in any particular form, nor was there any requirement that the end lines should be parallel.

Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196, 208.

See, also, Lindley on Mines, sections 58, 573, 576-77, 594, where these questions are ably discussed and the above conclusions announced.

Under that law but one vein could be included in a location, nor, no matter how much surface ground might be included in a patent, could title be obtained for more than one vein. Section 3 of the Act of 1866 expressly so provided.

14 Stat. at Large, p. 251.

Prior to the Act of 1872, had other ledges been discovered within the surface lines of a patented mining claim, they might have been located by a stranger, and the locator would have had the right to follow them and work thereon within such surface lines.

The foregoing was the situation when the act of 1872 was passed.

Change worked by the enactment of the law of May 10, 1872, in the ownership of other veins found within the patented surface of mining claims.

Section 3 of the act of 1872, already quoted, applied to mining locations theretofore, as well as thereafter, made, and granted to the then owners of such locations, "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

This act constitutes the source of the plaintiff's title to the Contact vein now in dispute in this action.

Subsequent to the granting of the patent to the Providence Mining Claim, and subsequent to the enactment of the law of May 10th, 1872, the Back or Contact vein was discovered running across the plaintiff's boundary line, f-g, and into defendant's mining claim called the New Years Extension. The New Years Extension was located in 1877—twenty years after the location of the Providence, six years after it had been patented, and five years after the passage of the law of 1872.

For many years the line f-g and its extension, f-g-g^1, was recognized and treated by the parties as the bounding plane between their mines, and it was not until three months prior to the commencement of this action that the defendant crossed it into what is claimed to be the complainant's ground, on the one thousand foot level.

Our contention is that the line f-g, being the line of the Providence location which crossed the onward strike of the Contact vein, must be held to be the end line of that ledge, and the line fixing the rights of the parties.

WHAT ARE END LINES?

We contend that, especially under the act of 1866, the boundary line of a location which crosses a ledge upon its strike must be held to be the end line of that ledge.

On the other hand, the defendant contends, or at least the Court ruled, that we must ascertain the original end line of the location, and that this line constitutes the end line of every vein found within the exterior boundaries of the claim.

Upon this point, this is the controversy in a nutshell.

(Should the line f-g-g^1 be held to be the dividing line between these mines, it will be unnecessary to consider the point, already argued, as to the ownership of that part of the Contact ledge lying beneath the parallelogram h-i-k-h^1, as such a ruling would establish our right therein along with all the rest of the ground situated south or southeast of that line extended indefinitely.)

In locations made under the act of 1866, unless required by local regulations, there was no occasion for end

lines. While as to the lode, as suggested in the Eureka Case, 4 Saw. 302, end lines were doubtless implied in the sense that a vein must have some thickness, and must end somewhere, and consequently that wherever it did end there would be a line, still there was no occasion for it to be in any way marked or fixed upon the surface. As the lode could be located and patented without adjoining surface, and the end of the vein could be determined merely by measurement, there was no occasion to fix end lines, nor, perhaps, any line, unless it was to bound surface rights.

It clearly appears that such was the only purpose in fixing the surface lines here; there can be no dispute as to this except as to the lines crossing the Granite ledge, and as the calls of the patent show conclusively that rights in the vein were not intended to stop where the surface line crossed it, in no sense did the boundary line become an end line of the location, nor was it intended or understood to be such. Had the owner at that time been asked whether that was the end of his location, he would most certainly have answered emphatically that it was not.

Considerable attention has been paid to this question, because the fact that the Providence vein, the one originally located, happens to cross the line g-h, seems to be the only reason for holding it to be an end line of the location, in preference to other lines.

Of course, if it is not the end line of the location, then there is no possible reason for holding it to be the end line of the Contact ledge.

But admitting for the argument, that it does constitute an end line of the location within the meaning of the law of May 10th, 1872, does it constitute the end line of the contact vein?

The end line of a lode is the boundary line which crosses it, regardless of whether it was originally intended as an end line or side line. Four times has this principle been sustained by this Court.

Mining Co. v. Tarbet, 98 U. S. 463.
Iron Silver-Elgin case, 118 U. S. 196.
Argentine-Terrible Case, 122 U. S. 478.
King v. Amy & Silversmith M. Co., 152 U. S. 222.

In Mining Company v. Tarbet, speaking of the act of 1866 and that of 1872, the Court said:

"We think that the intent of both statutes is that min-"ing locations on lodes or veins shall be made thereon "lengthwise, in the general direction of such veins or "lodes on the surface of the earth where they are discover-"able; and that the end lines are to cross the lode and ex-"tend perpendicularly downwards, and to be continued in "their own direction either way horizontally; and that the "right to follow the dip outside of the side lines is based "on the hypothesis that the direction of these lines corre-"sponds substantially with the course of the lode or vein "at its apex on or near the surface. It was not the intent "of the law to allow a person to make his location cross-"wise of the vein, so that the side lines shall cross it, and "thereby give him the right to follow the strike of the vein

"outside of his side lines. That would subvert the whole "system sought to be established by the law. If he does "locate his claim in that way, his rights must be subordi- "nated to the rights of those who have properly located "on the lode." And again, that the end lines of the claim, properly so called, are "THOSE WHICH ARE CROSS- "WISE OF THE GENERAL COURSE OF THE VEIN "ON THE SURFACE."

The other three cases, although decided under the act of 1872, are equally pointed.

These cases are of course conclusive of this controversy, if they are in point. But it is claimed they are not, and the learned Judges of the lower courts must have been of that opinion.

THE IRON SILVER-ELGIN CASE.

The Circuit Judge held that the line g-h was the end line of the location; that there could be but one end line, no matter whether the vein did or did not cross it, and that consequently it was also the end line of the Contact vein. (As will be noticed, he also, to some extent, adopted the line f-g as a boundary.) He seems to have rested this view upon the authority of an expression used, arguendo, by Mr. Justice Field in pronouncing the opinion in Iron Silver M. Co. v. Elgin M. Co., 118 U. S. 196, 207, as follows:

"It often happens that the top or apex of more than "one vein lies within such surface lines, and the veins "may have different courses and dips, yet his right to

"follow them outside of the side lines of the location "must be bounded by planes drawn vertically through "the same end lines. The planes of the end lines cannot "be drawn at a right angle to the courses of all the veins "if they are not identical."

We say that this was an expression used arguendo, because no question of that kind was there involved. There was but one ledge in that case, so there was no occasion to consider what would be the law if there had been more, except by way of argument or illustration.

Aside from this, we respectfully submit that this language was not intended, even by the learned Justice, as a statement of the law applicable to locations made under the act of 1866, nor was it intended to cover a case involving the question here presented.

Every decision must, of course, be considered in the light of the facts involved therein. The Iron Silver case was one where the location had been made under the act of 1872. Under this act end lines are of vital importance, and, as ruled in that case, must be parallel, or the location loses all extralateral right—that is, the right to follow the vein outside its boundaries.

As we have seen, surface lines were of no importance so far as the lode was concerned under the act of 1866, and as to such locations they only became important after the enactment of the law of 1872.

Next, the learned Justice did not have in mind such a question as we have presented here—that is, whether a side line which crosses a vein is, as to that vein, an end line, as held in the Flagstaff case, but whether the Court

can CREATE new end lines for each of the several veins that may be found within the boundaries of a location.

In that case, the location of the Stone claim had been made in the form of a horseshoe. The vein seems to have run in the same shape, leaving the location at the ends of the horseshoe, which were not parallel. The ledge did not cross the side lines at all, unless the ends of the horseshoe should be treated as side lines, which they clearly were not. The result was that there were no parallel lines that could be treated as end lines.

Under these circumstances it was contended, and was held by Justices Waite and Bradley, that end lines should be projected parallel to each other, and crosswise to the general course of the vein. It was in combating this view that Justice Field used the language quoted, and it will be readily seen that it has no reference to such a case as the one in hand.

Here, no necessity exists for the CREATION of an end line. One has already been created by the acts of the locators. It crosses the vein upon its strike, and as such does and must constitute its end line for many purposes, and it is the only line which crosses or approaches it upon the surface. It fills every definition of an end line that has ever been established by the Courts, and we respectfully submit that every consideration of justice and convenience requires that it should be treated as the end line of the Contact vein.

The Iron Silver case turned entirely upon the want of parallelism in the end lines—the actual end lines of the lode, not those called such, for they were parallel—as

is clearly stated in the following extract from the opinion:

"Under the act of 1866, 14 Stat. 251, parallelism in the "end line of a surface location was not required, but "where a location has been made since the act of 1872, "such parallelism is essential to the existence of any "right in the locator or patentee to follow his vein out- "side of the vertical planes drawn through the side lines. "His lateral right by the statute is confined to such por- "tion of the vein as lies between such planes drawn "through the end lines and extended in their own direc- "tion that is, between parallel vertical planes. It can "embrace no other portion. The exterior lines of the "Stone claim form a curved figure somewhat in the shape "of a horseshoe, and its end lines are not and cannot be "made parallel. . . . . We are therefore of the opinion "that the objection, that by the reason of the surface form "of the Stone claim, the defendant could not follow the "lode existing therein in its downward course beyond the "lines of the claim, was well taken to the offered proof."

So far as this decision of that case is in point here, it is in favor of the appellant, because it again holds and emphasizes the point that the line which the vein actually crosses is the end line, no matter what may be called such.

If a location happens to contain more than one vein,

one crossing through the ends of the location and another crossing a side line, why should there not be end lines established for each?

Take, for illustration Fig. 8, opposite page 14, showing a location with a cross vein pitching as indicated by the arrows, discovered, we will say, subsequent to the original location: Now, apply to this ideal location the principle established by the lower Court, that the end line of the location must constitute an end line of every vein found therein.

The result is that we have a ledge—the cross-ledge "B"—surrounded by end lines. Under all the decisions and the statute it could not be followed upon its strike beyond the side lines C D and E F. Of necessity and admittedly, the side line constitutes an end line to the extent at least of cutting off farther pursuit of the vein beyond that line. Then the section between the side lines passes downward on the dip until it reaches the plane of the end line, D F, and here again its pursuit is stopped.

If there is any principle as applied to ledge mining that may be called the distinctive American principle, it is the right of the miner to follow the ledge upon its dip "THROUGHOUT ITS ENTIRE DEPTH."

In this illustration we have a case where the right would clearly exist, under the decision in the Flagstaff case and similar cases, if the cross vein were the only vein in the location, although the miner had made a mistake and located crosswise of it instead of lengthwise, but which is to be entirely defeated simply because the orig-

inal end line still remains the end line of the first lode, and the location contains two veins instead of one.

Suppose, after the location had been made, it had been discovered that the vein located upon—Granite Ledge—instead of passing out through the line g-h, passed out as does the Contact vein. Can there be any doubt that the side line f-g (if it be a side line) would become the end line of the lode? There can be but one answer to this.

Why should it not then become the end line of the lode which does cross it, although the line g-h still remains the end line of the Granite lode?

In the case shown on Fig. 8, opposite page 14, what confusion can result from the exercise of the right to follow the cross ledge upon its dip "to its lowest depth"? The right to follow the other would, of course, cease at the end of the location, where upon its strike it crosses the end line, but no more reason can exist why the end line should not be treated as the side line of the cross ledge, and the miner be permitted to follow it between its side-end lines upon its dip outside the end line of the location, than there would be if that were the only vein in the location, as in the Flagstaff case, or the Amy & Silversmith case.

It will be observed that the contact vein has only been traced

a few hundred feet into the Providence ground. Whether in its course it continues on to the south end of the location, or passes out of one or the other of the side lines, is undetermined, and of no importance.

We are not troubled in this case with the difficulty that has confronted the courts in many of the cases that have arisen upon locations made under the act of 1872—the necessity of maintaining parallel end lines in order to prevent the locator from taking more of the vein beneath the surface than he has upon the surface.

The supposition that this principle also applied to locations under the act of 1866 seems to have been one of the reasons that led the learned Circuit Judge to the conclusion at which he arrived.

(See his opinion in Transcript, pages 90-91.)

But that this is erroneous, and that under that act the locator may obtain more of the vein beneath than upon the surface, if the end lines of his location happen to diverge, and that such a location is perfectly valid, has been so clearly shown by Mr. Lindley, that in order not to unreasonably extend this brief, we content ourselves with citing his work on Mines, sections 575, 576, 577, 600, and the cases there referred to by him.

It is also said that the cases cited from the Supreme Court of the United States are not in point, because, in all of them where side lines have been held to be end lines, the veins have crossed both side lines of the location.

Whether this is true of the Argentine-Terrible case is at least doubtful, especially in view of the diagram of the locations there in conflict, as given by Mr. Lindley in section 587. According to that, the ledge would only seem to cross one side line of the Adelaide location; nor does the opinion in the case (122 U. S. 478) indicate that it crosses both.

But no matter. Should this fact make any difference? We believe not.

Would an end line become any less an end line because the vein did not reach the other end line, or because it had not been traced through to the other end, which is all that can be said here?

Mr. Lindley, in his work, section 592, holds that this fact makes no difference, and we agree with him and adopt his reasoning.

See, also, Del Monte M. Co. v. New York, 66 Fed. Rep. 212, 215.

Carson City G. & S. Co. v. North Star M. Co., 73 Fed. Rep. 597.

The bounding plane established by both the Circuit Court and the Court of Appeals is entirely impracticable.

As will be noticed by reference to the judgment of the Circuit Court (see Transcript, p. 80), that Court established a bounding line running north 43 degrees east, from "f" to "g" of Fig. 6, and from "g" to "h," a line running north 73 degrees east, thus giving us, to say the least, the unique feature of a crooked bounding plane. While the learned trial judge held that the line g-h was the end line of our location, and that as such it must constitute the end line of all veins found within the claim, no matter in what direction they ran, he sacrificed consistency to justice to the extent of also holding the line f-g a boundary beyond which we have no right to go, nor defendant to come.

But the Court of Appeals modified this judgment by striking out that portion relating to the line f-g, and established the line g-h-h[1], and the plane of that line extended indefinitely, as the only boundary, thus giving us as the dividing line between the two properties, a line that does not run between them at all.

(See opinion, Transcript, page 277.)

The line f-g is the only line between the two mines, and yet by this decree that line is entirely ignored.

Several surprising results follow the establishment of the line g-h, as the only dividing line between the mines. If it is, and f-g is to be entirely ignored, then g-h must bound our rights on the ledge west of "g" as well as east of it. If so, it must be that we are entitled to go to that line where, as extended west, it crosses the apex of the lode in the New Years ground. (See, for illustration, Fig. 6.) If this be true, then we must own a portion of the vein of the New Years ground, which we have never supposed we did. If f-g is to be ignored, and g-h is not to be extended west of "g," then what does constitute a dividing line on the ledge above the point where, on its dip, it reaches vertically beneath "g"?

The Contact vein does not dip under the Champion ground, but extends into it upon its strike. If, then, the plane of the line g-h is the only limit of our right in the vein upon its dip, how and where are we entitled to reach that bounding plane north of the line f-g? How far from the surface must we keep, and upon what inclination along the vein must we descend, to reach it beneath the Champion, in order to keep upon the dip and not upon

the strike of the ledge? It would seem that these questions show how utterly impracticable the line established by the Court of Appeals is.

Suppose a vein should now be found crossing the line f-g, as does the Contact vein, but dipping to the west. If the line g-h is the true bounding plane for the Contact vein, it must also be for the other, and the result would be that the owners of the Providence would own somewhere in the depths several hundred feet upon the strike of this vein north of their boundary line f-g, and until they reach the plane of the line g-h, projected west.

In his Brief in the Court of Appeals, Mr. Lindley used, for illustration, a figure similar to fig. 9, here reproduced, and said, assuming for the argument that the Contact vein crosses the line f-e and passes on through location D, as marked on the diagram, then if f-g constitutes an end line, f-e must also be an end line. He then argued that this was inadmissible, because it would result in diverging end lines that would give the Providence a much greater length of the ledge as it dips into the earth than it has on the surface. In view of the conclusion announced in his treatise on mining law, sections 576-7, 600, that under the act of 1866 a location with diverging end lines is proper, he may not use the argument again, but we produce the figure for another purpose.

We assume, as he did, that the vein crosses the line f-e and passes into D. Now, let us try to apply the principle established by the lower courts in this case, that the lines g-h and a-p are the only end lines of the Providence location, and consequently the end lines of the Contact vein, to the settlement of a controversy as to their rights

FIG. 9.

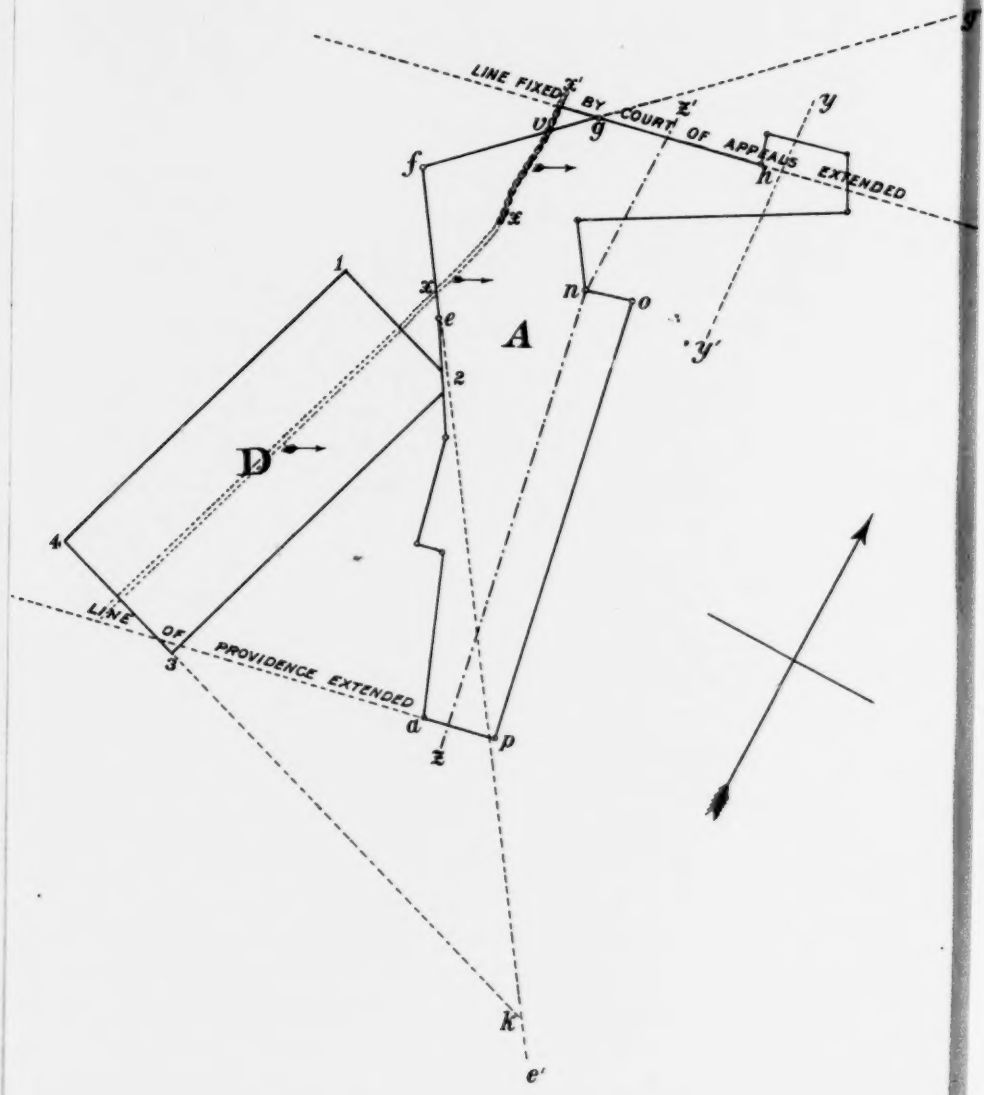
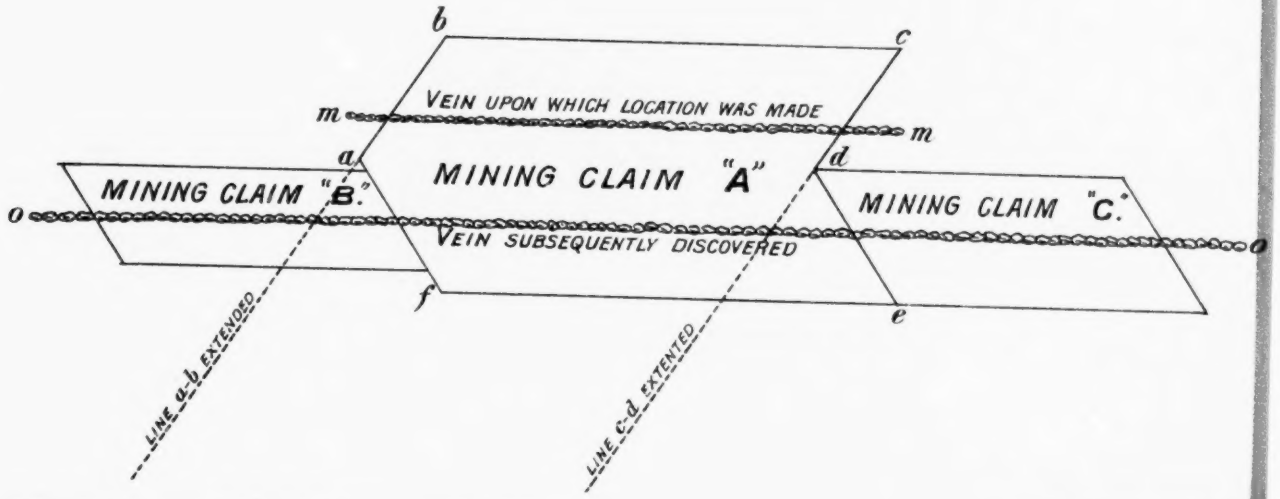

LINE FIXED BY COURT OF APPEALS EXTENDED
LINE OF PROVIDENCE EXTENDED
A
D
x'
z'
y
y'
g
f
h
x
u
v
e
n
o
1
2
3
4
a
z
p
k
e'

FIG 10.


b
c
m
VEIN UPON WHICH LOCATION WAS MADE
m
a
d
MINING CLAIM "B."
MINING CLAIM "A"
MINING CLAIM "C."
o
VEIN SUBSEQUENTLY DISCOVERED
o
f
e
LINE a-b EXTENDED
LINE c-d EXTENDED

in that vein between the Providence and location D. Of course it would be an impossibility. In such an imaginary case either f-e is the end line of that vein in the Providence, or there is none that can be applied, for certainly lines g-h and a-p are totally inapplicable.

Take again, the ideal location "A," found in fig. 10, which would be a perfectly correct location under the act of 1866, and try to apply the end lines a-b and c-d of the originally discovered vein, m-m, which, according to the decisions in this case must also constitute the end lines of the subsequently discovered vein, o-o, to the settlement of a controversy between locations A and B, or A and C, as to their rights in vein o-o. A glance at the diagram shows how impracticable it would be.

Any theory that leads to such results cannot possibly be correct. It would seem that these illustrations also demonstrate that the only line that can be held to be an end line is one that runs between two properties and crosses the apex of the vein at the point where it passes from one mining claim to the other; f-g is such a line as this, but g-h is not. F-g must at least divide the surface of the vein between the Providence and New Years. Mr. Lindley says: "Let it be conceded absolutely, that where a vein crosses any line of a location, the crossed line becomes an end line in the sense that it stops the right of pursuit on the course, or strike, of the lode. All Courts agree upon this."

Lindley on Mines, sec. 591, p. 731.

Then, as to this vein, *f*-g is an end line, and, to fulfill the purposes of an end line, must be drawn downward indefinitely, and it would seem, under the terms of the mining act of 1872, should also be continued in its own direction along the dip of the vein, instead of turning an elbow at "g."

In the Eureka case, 4 Saw. 302, 326, speaking of a similar question, Mr. Justice Field said:

"As the Richmond and the Champion were vein or lode "claims, a line dividing them must be extended along the "dip of the vein or lode, so far as that goes, or it will not "constitute a boundary between them. The lines dividing claims upon veins or lodes necessarily divide all "that the location on the surface carries, and would not "serve as a boundary between them if such were not the "case."

The principle established by the trial Court in this case, of making the line which crosses a vein an end line only for its length, and then turning an elbow, would have required this Court to hold in the Flagstaff, the Argentine-Terrible, and the Amy & Silversmith cases, supra, that the side lines there only became the end lines for their length, and then the true end line must turn the corner and follow the original end line of the location into the earth. Wherever, in any other case than this, has such a principle even been suggested, let alone being formulated into a decree?

A line to constitute the end line of a vein must be one of the exterior lines of the location which crosses it upon its apex.

The theory of the law is that a mining location will consist of a quantity of land surrounded by the exterior lines of the location. Within those lines the top or apex of the vein must lie; if not, the vein does not belong to that location. It follows that those lines must necessarily cross the apex, and such crossing lines are then to be extended downward vertically, and horizontally in their own direction, to constitute the end line of the lode. This line was certainly to be one of the exterior lines of the location.

Nothing could have been farther from the thoughts of the framers of the law than that a line situated as is g-h should constitute the end line of a vein which it did not cross until it was hundreds of feet away from the location.

If there can be but one end line of a location, which must constitute the end line of every vein found within that location, then it must be the end line of veins running parallel with it, as well as those running crosswise. This is, of course, a geometrical impossibility, and demonstrates that such could not have been the intention of the lawmakers.

In such a case, no matter what they may be called, the side lines are, and must be, the end lines of the vein, or else it has no end line.

The line g-h is not the end line of the Contact Lode, because it does not cross it. It is not an end line of the Pro-

vidence ledge even, because it runs some thirty feet south from the north end of that ledge. It is not an end line of the parallelogram h-i-k-h^1, because the north line of that parallelogram is about one hundred and fifty feet to the northward of it. It is not an end line of the Providence location, because the vein, as located and patented, extends beyond it, and so does the surface ground contained in h-i-k-h^1.

If the decision is correct, and the line g-h-h^1 is the only end line that can be recognized, and the one that must constitute the end line of every vein discovered within the surface lines of the Providence, then what is the situation of veins within the parallelogram h-i-k-h^1?

Suppose a ledge should be discovered running through that parallelogram as represented by the line y-y^1, on fig. 9, opposite page 34.

Would it not belong to the patentee of the ground, as one of the ledges granted to him by the act of May 10th, 1872? Its apex would be within the surface lines of the Providence location. By what course of reasoning could it be taken from the owner of that location, north of line g-h-h^1 any more than south of it?

To say that the end line of such a vein would be the line i-k, would be in conflict with the whole theory upon which the case was decided, which was that there can be but one end line, and that must be the original end line of the location.

The law of cross veins.

We contend that in the cases of Watervale M. Co. v. Leach (Arizona), 33 Pac. Rep. 418, and of Wilhelm v. Silvester, 101 Cal. 358, the Supreme Courts of those jurisdictions have established principles that are very much in point here.

Those were cases involving the title to cross veins—veins passing out through the side lines of the location, and crossing the vein originally located.

In each of them it was held that the locator owned such cross vein to its full extent within the boundaries of his location, and constituted, of course, a virtual holding that the side lines became end lines as to that vein, and consequently, that there can be more than one end line to a location.

In Wilhelm v. Silvester, supra, referring to Revised Statutes, section 2322, the Court said:

"This language is clear and explicit, and in designat-
"ing the property rights of locators, it is in nowise ambig-
"uous or uncertain. It expressly, and in language which
"needs no construction, grants to such locator every
"ledge or lode the top or apex of which lies within the
"surface lines of the location; that is, such part of the
"ledge as lies within such surface lines. And there is no
"limitation or exception of any such ledge on account of
"the direction in which it may run. It may be parallel
"with the originally discovered ledge, or may approach
"it at right angles, or at an obtuse angle, or at an acute
"angle; it may intersect it or not, and still it will be clear-
"ly within the language of said section."

The language of the Arizona Court is equally clear.

See, also, Pardee v. Murray, 4 Mont. 234, and Lindley on Mines, sections 559, 560, where the learned author approves of the Arizona and California rule.

THE DEFENDANT'S THEORY OF AN END LINE.

Does the defendant's proposition of creating a new end line at v-v¹, figs. 5 and 6, offer any better solution than the one adopted by the Court? We think not.

1. We already have an end line in f-g established by the locators of the Providence, recognized for many years by the parties to this litigation, just, equitable, and legal in all respects. There is no necessity or occasion for the Court to create another.

2. The line v-v¹ is based upon the theory of moving the original end line g-h south until it intersects the Contact vein. But as the latter is, as we have seen, in no sense an end line, but merely one of the surface lines, there would be no propriety in doing this.

3. The proposition is based upon the assumptions, first, that the line g-h is the original end line, and, secondly, that there can be no other end line but that for all the veins found within the patented ground—assumptions, as we have seen, entirely without foundation.

If, as the defendant admits, we must move this line in order to make it fit, why not adopt the one already made?

Even if the line f-g is not the end line of the Contact vein, if the Court must adopt or create one, why not adopt the one made by the parties?

4. In the Iron Silver-Elgin case, supra, and the Amy & Silversmith case, supra, this Court emphatically declined to create new end lines for a locator.

In the latter case (152 U. S. 228) Mr. Justice Field, in delivering the opinion of the Court, said:

"The Court cannot become a locator for the mining "claimant, and do for him what he alone should do for "himself. . . . . It cannot relocate his claims and "make new side lines or end lines. Where it finds, as "in this case, that what are called side lines are in fact "end lines, the Court, in determining his lateral rights, "will treat such side lines as end lines and such end lines "as side lines; but the Court cannot make a new location "for him, and thereby enlarge his rights. He must stand "upon his own location, and can take only what it will "give him under the law."

5. The line v-v[1] would give the respondent a large portion of the Contact vein within the surface boundaries of the Providence, and would give it a portion of the vein within such boundaries which in its notice of relocation it expressly abandoned. (See statement of the case, pp. 4 and 5 of this Brief, and figs. 3, 4, and 6.)

BY AGREEMENT, BY ACQUIESCENCE, AND BY ESTOPPEL THE LINE F-G HAS BECOME THE END LINE BETWEEN THE TWO CLAIMS.

By all or either of these modes a boundary line may be fixed between two properties by parol.

4 Am. & Eng. Ency. of Law (second ed.), 859.

There was a dispute between the Champion Mining Company and the Providence Mining Company as to the end line between the New Years Extension and the Providence claim on the Contact Vein.

It is true the Providence location was established by patent, but that did not prevent the Champion Mining Company from disputing said line, or from making a location covering a considerable portion of the Contact Vein on the surface ground south of the line f-g. (See fig. 3.)

That the parties may dispute a line of patented ground we think is beyond question, because by disputing, taking into possession, and holding adversely for the period prescribed by the Statute of Limitation, they would acquire a better right than the patentee.

But the owners of the Providence objected to such an invasion of their claim. Thereupon, the Champion Mining Company, through its Board of Directors, authorized John Vincent, its Superintendent, and Edward Lynch, its attorney, to make for the company a relocation of the claim, so as not to conflict with the Providence location. (Trans., pp. 175-176.) Lynch drew the notice of relocation, which appears in the Transcript, pages 30-33, and delivered it to Vincent. The notice of relocation purports on its face to have been made for the company. Vincent posted the notice and made the relocation, started the Champion shaft so as to conform with the north boundary of the Providence location running south, 43 degrees west, so that it never could cross that line or its prolongation.

In that notice of relocation the south end of the lode line is fixed in the following manner:

"Commencing at a point on the northerly bank of Deer "creek, which point is 60 feet south, 11 degrees 45 min- "utes east, of the mouth of the New Years Tunnel, and "running thence along the line of lode towards the north- "east corner of the Providence mill, about south, 46 de- "grees 15 minutes east, 200 feet more or less, to a point "and stake on the northerly line of the Providence Mine. "patented, designated as Mineral Lot No. 40, for the "south end of said lode line." (Trans., p. 31.)

And also by the following language:

"And whereas, part of this claim as originally describ- "ed, and as hereby relocated, conflicts with the rights "granted by the letters patent of said Providence Mine, "said Lot No. 40, now, therefore, so much of this claim. "both for lode and surface ground, as originally conflict- "ed or now conflicts with any portion of the surface or "lode claims or rights granted by said patent is and are "hereby abandoned, which portion of this claim so aban- "doned is described as follows, to-wit: All that portion "of the above described New Years Extension Claim "for surface and lode which lies south of the northern "boundary line of said Providence Mine, which runs "north 43 degrees 10 minutes east, across the southeast- "ern corner of this claim." (Trans., p. 32, and fig. 4.)

The said last mentioned line is the same as f-g, because it appears in all the diagrams that the line f-g is the only line which crosses the corner of the original location of the New Years Extension, which is the southeast cor-

ner of the New Years Extension as originally located and by this notice of relocation abandoned.

The defendants, in their petition for removal from the State to the Circuit Court, claimed title under said notice of relocation. (Trans., 23, 31, 33; testimony of Vincent, Trans., p. 154.)

All of said facts were reported to the directors, while in session, and also the object and purpose of giving the shaft its direction, viz., to avoid any conflict with or crossing of said line f-g. (Trans., pp. 154-155.)

How can a corporation bind itself if the Champion Mining Company did not do so by the resolution authorizing Vincent and Lynch to use their discretion in fixing the lines of the New Years Extension and of all their mining property, and in authorizing Vincent to use his own discretion in regard to the work to be prosecuted on the claim, a part of the work being the sinking of a shaft which was afterward sunk by Vincent some forty feet in depth? (Trans., p. 154.)

A report was made to the Board of Directors of the work which he had done—which, of course, included the relocation of the claim—why he had done it, and why he had started the shaft in that direction, namely, so that it could never interfere with the line f-g as established by the relocation, and it was ratified by the acts of the company thereafter in continuing the shaft down to the 1000-foot level. None of the drifts were extended across the plane of the line f-g except the 800, 900, and 1000-foot levels. The first level to run through the line was the 1000-foot level, where rich ore was found, and then the appellee returned to the 800 and 900-foot levels to reach

the rich ore found on the 1,000-foot level, and the 1,000-foot level was not driven through the line f-g until about three months before the commencement of this action, and that trespass was the cause of this suit. (See fig. 5.)

The statements of Vincent were binding upon the corporation, because he was clothed with all of the power that the corporation could give him respecting the matter in dispute between the two companies, so far as the boundaries of the New Years Extension were concerned, and the statements of Vincent were made while he was performing the work which he was authorized to perform by the corporation, namely, in sinking the shaft.

Such a conversation was part of the res gestae; the declarations were made within the scope of his agency and authority from the corporation, and were reported to the corporation. (See Vincent's Testimony, Trans., p. 154.)

An agent clothed with power and authority, as Vincent was, while engaged in the act, may state the purpose of the act, and such statement becomes a part of the res gestae, and is binding upon the principal.

1 Greenleaf on Evidence (14th ed.), sec. 113.
Green v. Ophir C. S. & G. M. Co., 45 Cal. 522.
Tait v. Hall, 71 Cal. 150.

These proceedings and the notice of relocation show in express terms that there was a conflict between the appellant and the appellee as to the south end line of the New Years Extension and as to the north end line of the Providence location.

That the parties had the right and the power to agree upon the boundary line will not be disputed.

They had a right to adjust any dispute as to side lines or end lines.

The line f-g was recognized as the boundary line between the two companies and that it was in fact such is not disputed. It was acquiesced in for more than nine years and until about three months before the commencement of the suit.

Acting upon the theory that the line f-g, extended, was the true boundary, the Providence Company sank its shaft and by means of crosscuts and drifts therefrom made valuable improvements upon the ground in dispute for the purpose of exploring, opening up and working it. (See Fig. 5.)

The Circuit Court recognized the agreement, but held that it did not give complainant any right to extend that line as a boundary line any further than to point "g."

There is no difference between an agreement concerning an end line and one concerning any other boundary line. An agreement concerning an end line of a location confers upon the parties to the agreement all that an end line implies. When an end line is agreed upon it means that it shall be the measure of the extralateral right, and when used for that purpose, it shall be continued in its own direction.

The parties to the agreement were presumed to understand the law as laid down in section 2322, and to have made their agreement concerning the end lines under the light of that law, and with the view of conferring upon each the right which that law gives.

Under that law the end line must be continued in its own direction. It is to serve as the measure of the rights

of the parties in the Contact Lode, and it could not serve that purpose unless continued in its own direction. As was said by the Court in the Eureka case, 4 Sawy. 326: "All lines dividing claims upon veins or lodes necessarily "divide all that the location on the surface carries, and "would not serve as a boundary between them if such "were not the case."

In that agreement the parties acquiesced for more than nine years. If there had been no agreement but mere acquiescence for such a length of time, the Statute of Limitations precluded either from asserting that it was not the true line.

Sneed v. Osborn, 25 Cal. 619, 630-631.
Blair v. Smith, 16 Mo. 273.
Shields v. Titus, 46 Ohio, 528.
Gwynn v. Schwartz, 9 S. E. Rep. (W. Va.) 880.

In Atchison v. Pease, 96 Mo. 566, there was a dispute between two proprietors of adjacent lands as to the boundary line. The contending proprietors went upon the land and agreed verbally upon a boundary, and the fence which then stood between them was moved to such agreed boundary. Held, that the agreement was binding upon the parties and those claiming under them, and that the agreement was not within the Statute of Frauds.

In Fisher v. Bennehoff, 121 Ill. 426, Fisher and Means had a line running between their respective lands, which line was recognized, and fences built to it, and timber cut on the faith of it for thirty-five years. Held, that both parties were estopped from asserting that it was not the true division line.

In Helm v. Wilson, 76 Cal. 476, it was held that a dispute was not even necessary to sustain an oral agreement as to a boundary line. "Where it has been proved that "a line has been agreed upon or acquiesced in, it will not "be disturbed."

Truett v. Adams, 66 Cal. 223.
White v. Spreckels, 75 Cal. 610.

The mere acquiescence in a line as a dividing line between adjoining properties for fifteen years, although but one of the proprietors, and perhaps neither, is in actual possession, is sufficient to establish that line as the true line, if known and claimed by both proprietors.

Brown v. Edson, 23 Vt. 435, 450-451.

In McCormick v. Barnum, 10 Wend. 105-109 and 110, it was held that where parties either agree, or for a long period of time acquiesce, in a division line, such line will not be disturbed. Even when a surveyor has mistakenly established a division line, the parties will be concluded if it be acquiesced in for a long period of time, and especially if the period of time has continued for the period of statutory limitation.

In Doolittle v. Bailey, 52 N. W. Rep. (Ia.) 337, 338, the parties treated a certain corner as the true government corner, and acquiesced in it for a period of about ten years, and planted hedges, built fences and laid out a highway in conformity therewith. Held, that the corner so acquiesced in would not be disturbed.

Pickett v. Nelson, 71 Wis. 542-46.

The certificate of purchase of the New Years Extension did not constitute a new title sufficient to avoid the end line agreement and the subsequent acquiescence in that line.

First, the acquiescence continued after that certificate was issued, as well as before, and acting upon it the Providence Company incurred the expense of prospecting the ground in dispute, and

Secondly, by location the Champion Company had been the owner of the ground since 1877. It had been the owner, both legal and equitable, and could have maintained any action, either at law or in equity, for any invasion of its rights therein just as well before the certificate issued as afterwards. The certificate was but the confirmation of that title instead of the grant of a new one.

Belk v. Meagher, 104 U. S. 279.
Gwillam v. Donnellan, 115 U. S. 45.
Lindley on Mines, secs. 539, 542.

In Sheldon v. Perkins, 37 Vt. 548, the Court held (quoting from the syllabus): "While one is in possession of "land in his own right as owner, he is to be regarded as "owner, though he do not possess the legal title, and his "acquiescence in a boundary line is as binding as though "the legal title had been conveyed to him."

CONCLUSION.

We therefore contend that the judgment of the Court of Appeals is erroneous because:

First. It takes from the appellant that portion of the Contact ledge within the boundaries of the parallelogram h-i-k-h^1.

Secondly, (a). It establishes the line g-h-h^1—an impossible line—as the end line of the Contact vein.

b. It fails to establish the line f-g-g^1 as the true end line and bounding plane of the Contact vein.

c. It fails to establish the line f-g-g^1 as the boundary agreed upon by the owners of the two mines, and acquiesced in by them for many years.

LINDLEY ON MINES.

We have cited and quoted Mr. Lindley's work on mines quite liberally in the foregoing pages. We have found it a clear and generally accurate presentation of the law governing the location and ownership of mining property, and we do not hesitate to pronounce it the ablest work on that subject yet produced, and one that will remain a standard for many years to come.

At the same time we think it only just to ourselves to say that there are other sections of the books that we have not cited, and that we do not admit to state the law as applied to a case like the one at bar.

Mr. Lindley has been an attorney in this case from the commencement, in 1893. By his eloquence and skill as

an attorney he has induced the Circuit Court and Court of Appeals to render the decisions they have in this case, and now as an author he cites those cases as establishing the law to that effect.

This is entirely legitimate, because until reversed, they certainly do establish it, but as this appeal is taken for the very purpose of endeavoring to obtain that reversal, we naturally cannot agree that Mr. Lindley's statements of the law founded upon them are correct.

We respectfully submit that the decree of the Circuit Court of Appeals and that of the Circuit Court should be reversed.

JAMES F. SMITH,
DANIEL TITUS,
R. R. BIGELOW,
Solicitors for Austin Walrath.